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No. 04-967

Supreme Court, U.S.
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In The

# Supreme Court of the United States

NORMA McCORVEY,
FORMERLY KNOWN AS JANE ROE,

*Petitioner,*

v.

BILL HILL, Dallas County District Attorney,

*Respondent.*

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit**

## BRIEF OF *AMICUS CURIAE* BRENDA ALEXANDER IN SUPPORT OF PETITIONER

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## INTEREST OF THE *AMICUS CURIAE*[1]

*Amicus curiae*, Brenda Alexander, is an individual whose mother attempted to abort her through chemical means. The abortion failed to end the life of Brenda Alexander, but as a result, Brenda Alexander, suffered emotional hurt, and the relationship with her mother was strained. Since discovering the events before her birth, Brenda Alexander is dedicated to ending abortion and promoting respect for all human life. Brenda Alexander submits this brief in support of Norma McCorvey, formerly known as Jane Roe.

## SUMMARY OF ARGUMENT

Since the decision by the United States Supreme Court in *Roe v. Wade*, 410 U.S. 113 (1973) to extend the right of privacy to a woman's decision to terminate a pregnancy, a number of factual and legal developments have occurred that would make the continued application of that decision inequitable. Over the course of the last thirty-two (32) years, the harm done to women, men, families and society has mounted, yet the states have been effectively denied the ability to exercise their power in protecting the health and welfare of their residents. This is largely due to the *Roe v. Wade* decision and those decisions coming thereafter that have kept the states from acting in the best interests of their citizens. The concurring opinion of Judge Edith H. Jones in *McCorvey v. Hill*, No. 03-10711, *slip op.*, at 11-12 (5th Cir. Sep. 14, 2004) sets forth this state of affairs:

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[1] Counsel for a party did not author this brief in whole or in part. No person or entity, other than the *Amicus Curiae*, its members, or its counsel made a monetary contribution to the preparation and submission of this brief.

> "In sum, if courts were to delve into the facts underlying Roe's balancing scheme with present-day knowledge, they might conclude that the woman's 'choice' is far more risky and less beneficial. . . .
>
> "At the same time, because the Court's rulings have rendered basic abortion policy beyond the power of our legislative bodies, the arms of representative government may not meaningfully debate McCorvey's evidence. The perverse result of the Court's having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, is that the facts no longer matter. . . .
>
> "One may fervently hope that the court will someday acknowledge such developments and re-evaluate Roe and Casey accordingly. . . ."

While the law continues to evolve in such a way as to increasingly expand the responsibilities and powers of the states in caring for the health of their citizens, for the reasons set forth by Judge Jones above, they are prohibited from doing so. There are more than 5,000 pages documenting the harm, physical, emotional, and psychological, to women, and by implication, those around them, brought by abortion. Expert opinions from health care professionals clearly indicate the link between abortion and a number of maladies that affect women immediately after an abortion and throughout their lives.

The ramification of this situation is that the states are unable to adequately protect their citizens by legislation after being allowed a healthy discussion of the medical, psychological, emotional, and familial harm of abortion. This can only serve to negatively impact the public health requiring greater expenditures of public and private funds at a time when states and private firms are under severe

fiscal strain largely due to the rising health care costs and increased demands for health care services. With the number of abortions exceeding one million per year, the impact of abortion on public health is substantial. The Court should address the compelling issues raised by the writ of certiorari as they are of great national importance.

## ARGUMENT

This case provides the Court with an opportunity to review a social policy that has serious, and long-lasting, negative effects on women and hence society at large. The issues raised by the motion filed pursuant to Rule 60(b) of the Federal Rules of Civil Procedure present themselves at a critical time, and these issues certainly are not moot. The amount of evidence that has accumulated, and continues to accumulate, as to the deleterious nature of abortion is astounding and worthy of serious review, yet there has been no forum for addressing the policy implications. Federal jurisprudence has undergone major changes since the decision in *Roe v. Wade* was handed down. The power and authority of the States in caring for their citizens has been given a greater recognition by the United States Supreme Court over the course of the last thirty-two years since the *Roe v. Wade* decision. This brief focuses on some of the substantive issues that the lower courts did not reach by virtue of their erroneous decisions not to hear the matter. The Court should grant the petition for a writ of certiorari.

### I. COMPELLING REASONS EXIST FOR THE EXERCISE OF JUDICIAL DISCRETION IN GRANTING THE PETITION FOR WRIT OF CERTIORARI

Rule 10 of the Rules of Court of the Supreme Court of the United States sets the standard for granting writs of

certiorari: "A petition for writ of certiorari will be granted only for compelling reasons." Among those compelling reasons is included a decision by a "United States court of appeal . . . [of] . . . an important question of federal law . . . or has decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c).

The cases examined by the Court are not to be hypothetical, rhetorical, or academic exercises. In *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 75 S.Ct. 614 (1955), this Court explains that it squarely faces issues of a constitutional nature to "reach to a problem beyond the academic or the episodic. This is especially true where the issues involved reach constitutional dimensions, for then there comes into play regard for the Court's duty to avoid decision of constitutional issues unless avoidance becomes evasion. . . ." Cases accepted on writs of certiorari are those " . . . 'involving principles the settlement of which is of importance to the public, as distinguished from that of the parties. . . .'" *National Labor Relations Board v. Pittsburgh S.S. Co.*, 340 U.S. 498, at 501, 71 S.Ct. 453 (1951).

The *Rice* case involved an action for damages concerning a private cemetery's refusal to permit burial of a non-Caucasian. The *National Labor Relations Board* case involved alleged unfair labor charges. Both cases met the standards for granting a writ of certiorari because of the actual or projected impact on many people. The *Roe* Petition is no different. More than forty-five million abortions have been had since the legalization of abortion, and at the rate of more than one million per year, many more men, women, and children will be effected. If one were to consider that each conception involves a woman, a man, and the child, then with forty-five million abortions one could conclude more than one hundred thirty-five

million human beings have been directly involved with abortion since state restrictions were lifted. At the rate of one million abortions per year, at least three million more human beings are involved annually. Up to one quarter of all pregnancies end in abortion[2] and abortion has become the most common medical procedure performed on women.

The impact on so many is an impact on society at large, and on the States in particular. With the evolving notions of federalism that have been occurring in this Court's jurisprudence since the mid 1970s, almost immediately after the *Roe* decision was handed down, constitutional questions have arisen as to the extent and nature of the Court's discerned right to privacy in the area of abortion. The resolution of these constitutional questions are of a compelling, and very real, importance to the public, the states, and the nation as a whole since abortion has become such a frequent procedure.

## II. THE RULE 60(b) MOTION BY PETITIONER IS NEITHER MOOT NOR UNTIMELY

### A. The Doctrine of Mootness Is Inapplicable to the Instant Case Since the Issues Giving Rise to the Case Have Not Disappeared and Any Court Decision Will Have A Practical Effect

"A case is moot if the issues that gave rise to it have been resolved or have otherwise disappeared. Such a case is apt to be dismissed because a court decision would have

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[2] *See The World Almanac and Book of Facts* 2004 pp. 73, 77.

no practical effect."[3] Some view the use of the mootness doctrine as a "convenient 'out'."[4]

The issues that gave rise to *Roe v. Wade* remain. Women are still becoming pregnant and are considering their options. These issues have taken on new significance with the changes in the judicial view of federalism since the decision was rendered. As the increasingly obvious deleterious effects of abortion continue to accrue and as a high rate of abortions continue, a court decision will have enormous practical effect. Denying the Petition, and the Rule 60(b) motions, keeps a critical discussion of women's health in the dark. Granting the Petition and the Rule 60(b) motions allows for a discussion, and the development of policy, to avert any more continued harm to women's health and society's overall well-being.

Now is an important time to face the issues presented by the Petition since matters of public health, health costs, and declining social welfare systems ultimately affecting all citizens are implicated. The decision will affect things such as how women lead their lives, public health, the ability of the states to protect the health of their citizens, and the overall condition of the social systems in the United States.

### B. Circumstances Make Timely The Motion Brought Under Rule 60(b)

Rule 60(b) of the Federal Rules of Civil Procedure allow for earlier decisions to be changed when "(5) . . . it is no longer equitable that the judgment should have prospective

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[3] *See* Otis H. Stephens, Jr. and John M. Scheb II, *American Constitutional Law* at 24 (3rd ed. 2003).

[4] *See* Otis H. Stephens, Jr. and John M. Scheb II, *American Constitutional Law* at 25 (3rd ed. 2003).

application; or (6) any other reason justifying relief from the operation of the judgment." The Rule states that a motion under sections (b)(5) and (b)(6) must be made "within a reasonable time". "'What constitutes reasonable time must of necessity depend upon the facts in each individual case.' The courts consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and they consider whether the moving party had some good reason for his failure to take appropriate action sooner. . . . In some of the . . . cases the court merely states the time interval involved and says that it was unreasonable but undoubtedly the court forms this judgment in the light of the circumstances of the particular case."[5] Indeed, there is no time limit particularly when it comes to Rule 60(b)(6). *Strama v. Peterson*, 96 F.R.D. 198, 199 (D.C. Ill. 1982) (*citing Wright and Miller* Section 2866).

In the instant case, the District Attorney for Dallas County, Texas has not filed any opposition to the Rule 60 Motion filed by Norma McCorvey. Indeed, he has no opposition to the Petition for Writ of Certiorari. These are not the actions of a party that has been prejudiced or stands to suffer prejudice by any delay from the Petitioner.

Petitioner explains the circumstances as to why she did not file the Rule 60 motion sooner than 2003, and these circumstances are intimately tied up with how the case came to be. Norma McCorvey was an uneducated woman living on the streets (*Norma McCorvey Affidavit,* Para. 8); she did not understand just what abortion meant (*Norma McCorvey Affidavit*, Paras. 9 and 12); and she was "drunk or stoned" for a very long time after the decision (*Norma McCorvey Affidavit,* Para. 26).

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[5] *See, Wright and Miller* Section 2866.

These circumstances also include what amounts to manipulations by the lawyers of the Petitioner more than thirty years ago. This manipulation included repeatedly telling her that an unborn child was "only tissue" (*Norma McCorvey Affidavit*, Paras. 9, 14); never explaining what abortion involved (*Norma McCorvey Affidavit*, Paras. 12, 14); allowing Petitioner to sign an affidavit without explanation, without understanding, and without even reading it (*Norma McCorvey Affidavit*, Para. 13); and only speaking with her two times – to sign the affidavit, and to discuss the case over "pitchers" of beer before agreeing to be the plaintiff (*Norma McCorvey Affidavit*, Paras. 8, 13).

After years of working in abortion facilities, Norma McCorvey accepted "what abortion really is: . . . a violent act which kills human beings and destroys the peace and the real interests of the mothers involved." (*Norma McCorvey Affidavit,* Para. 26) She had spent years observing that women are not given information on the procedure, that women were not told of the options, that no one explained the psychological and physical ramifications of abortion, there was no time for the mother to reflect, and there was no informed consent. (*Norma McCorvey Affidavit*, Para. 22) She witnessed the unsanitary condition of these facilities (*Norma McCorvey Affidavit*, Para. 20), and the uncaring actions of unqualified abortionists who risked the lives of the women by their actions (*Norma McCorvey Affidavit*, Para. 21). All of these observations, submitted under oath, stand in striking contrast to the findings of this Court in *Roe v. Wade* that abortion is a benign, safe procedure. A great injustice has been done to the women of America, and this injustice threatens to be allowed to continue unless it is addressed in this Petition.

The issues of fact and law (as discussed more fully below) are simply of so compelling a nature that the "out" of mootness should not be employed. Ironically, before *Roe*

*v. Wade*, policy discussions could be carried on more openly and honestly than today. It is time to address the uncontroverted evidence of the negative impact of abortion so as to prevent the continuation of injustice.

## III. PETITIONER'S MOTION PURSUANT TO RULE 60(b)(5) AND 60(b)(6) PRESENTS MORE THAN SIGNIFICANT CHANGES IN BOTH FACTUAL CONDITIONS AND THE LAW

### A. The Conditions Under Rule 60(b)(5) Have Been Met

Petitioner successfully established the basis for a motion under Rule 60(b)(5) motion and the District Court erred also in not granting the motion. Those requirements were set forth by this Court in *Agostini v. Felton,* 521 U.S. 203, at 215, 117 S.Ct. (1997):

> "In *Rufo v. Inmates of Suffolk County Jail, supra,* at 384, 112 S.Ct. at 760, we held that it is appropriate to grant a rule 60(b)(5) motion when the party seeking relief from an injunction or consent decree can show a 'significant change either in factual conditions or in law.' A court may recognize subsequent changes in either statutory or decisional law. . . . 'The court cannot be required to disregard significant changes in law or facts if it is satisfied that what it has been doing has been turned through changed circumstances into an instrument of wrong.'"

Changes in the factual circumstances must not have been anticipated at the time of the original decision. This Court went on to say in *Agostini*, a case involving increased school costs, that "[P]redictions of additional costs turn[ing] out to be accurate does not constitute a change in factual conditions warranting relief under Rule 60(b)(5). . . . 'Ordinarily . . . modification should not be

granted where a party relies upon events that actually were anticipated at the time [the order was entered]' . . ." *Id.* at 216-217.

It is clear from a reading of *Roe v. Wade,* that there is no anticipation of harmful physical effects on women, men, or society. Indeed, there is no discussion other than that abortion, as a medical procedure, may be safer than childbirth. The Court concluded that carrying a child to term and that childbirth may cause greater harm to a woman than abortion:

> "The detriment that the State would impose upon the pregnant woman by denying this choice altogether is apparent. Specific and direct harm medically diagnosable even in early pregnancy may be involved. Maternity, or additional offspring, may force upon the woman a distressful life and future. Psychological harm may be imminent. Mental and physical health may be taxed by child care. There is also the distress, for all concerned, associated with the unwanted child, and there is the problem of bringing a child into a family already unable, psychologically and otherwise, to care for it. In other cases, as in this one, the additional difficulties and continuing stigma of unwed motherhood may be involved. All these are factors the woman and her responsible physician necessarily will consider in consultation." *Id.*, at 153.

The Court focused on how the abortion procedure was safer than birth:

> "Modern medical techniques have altered this situation. Appellants and various *amici* refer to medical data indicating that abortion in early pregnancy, that is, prior to the end of the first trimester, although not without its risk, is now relatively safe. Mortality rates for women undergoing early

> abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth." *Id.*, at 149.

The Court did not discuss, nor did it anticipate, any long-term physical and emotional effects of abortion nor did it ever anticipate that childbirth may become safer. Indeed, there is no indication of any negative ramifications of abortion to either aborting women or society at large. The research since the Court's holding in *Roe v. Wade* clearly shows that abortion poses long term health and psychological harm and that it has become more dangerous than childbirth.

Death rates associated with abortion are higher than those mortality rates associated with childbirth. (*Affidavit of David C. Reardon,* p. 7.) Women who have had abortions experience significant negative psychological sequelae. (*Affidavit of David C. Reardon,* p. 42.) Women are generally not offered adequate screening for risk factors thereby making more likely that abortion will cause psychological trauma. (*Affidavit of David C. Reardon,* p. 53.) "There is no statistically validated medical evidence that abortion is ever more likely to be beneficial to any group" of women under any circumstance. (*Affidavit of David C. Reardon,* p. 89.) Childbirth is more beneficial than abortion in at least the following areas: reducing the risk of breast cancer, cervical cancer, ovarian cancer, liver cancer, endrometrial cancer, and colon and rectal cancer. (*Affidavit of David C. Reardon,* p. 96.) Women who undergo childbirth have lower rates of depression than do women who abort, and women who abort have higher rates of clinical depression, smoking, and substance abuse. (*Affidavit of David C. Reardon,* p. 96.)

### B. Sufficient Grounds Exist for the Application of Rule 60(b)(6)

Rule 60(b)(6) provides for relief from a judgment or decision to prevent manifest injustice. It is an equitable remedy that relies on the Court's equitable powers. This Court held in *Klapprott v. United States*, 355 U.S. 601, at 614-615, 69 S.Ct. 384 (1949). *Klapprott v. United States*, decided near the inception of Rule 60(b)(6), involved the loss of citizenship by an individual. In finding this loss as a circumstance that justified relief under Rule 60(b)(6), this Court held "It may result also in loss of both property and life, or of all that makes life worth living." *Id.* at 612.

"In simple English, the language of the 'other reason' clause, for all reasons except the five particularly specified, vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 702 (10th Cir. 1989). "A change in relevant case law by the United States Supreme Court warrants relief under Fed.R.Civ.P.60(b)(6)." *Id.* In *United States v. McDonald*, 86 F.R.D. 204, 208 (D.C. Ill. 1980), the District Court emphasized the importance of liberally allowing Rule 60(b)(6) motions:

> "Moreover, once extraordinary circumstances or hardship is found, Rule 60(b)(6) is to be liberally applied to 'accomplish justice.' 7 Moore's Federal Practice P. 60.27(2), pp. 352 et seq."

It is not difficult to see that the harm caused by abortion (depression, breast cancer, cervical cancer, substance abuse, etc.) stands to rob so many unsuspecting of "all that makes life worth living." The relief available under Rule 60(b)(6) should be made available to the Petitioner.

## IV. CHANGES IN FEDERAL JURISPRUDENCE HAVE CHANGED THE LEGAL BASIS OF *ROE V. WADE*

The Tenth Amendment to the United States Constitution reserves powers to the States, and is an essential component of Federalism in the United States: "The powers not delegated to the United States by the Constitution nor prohibited by it to the States, are reserved to the States respectively, or to the people."

"Inherent police power belongs to the states." *XO Missouri v. City of Maryland Heights*, 362 F.3d 1023 (8th Cir. 2004). The Court has a long history of recognizing the existence of state police powers. In *Berman v. Parker*, 348 U.S. 26, 32, 75 S.Ct. 98 (1954) the Court opined that

> "Public safety, public health, morality, peace and quiet, law and order – these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it."

"The exercise of the policy [sic] power for the general welfare of the public is a right reserved to the states by the Tenth Amendment to the Constitution." *Brown v. Brannon*, 399 F. Supp. 133, 147 (M.D.N.C. 1975). "Each state has an interest in protecting the health and the physical and mental well-being of her citizens. . . . A state legislature pursuant to its police power has the right to enact legislation which attempts to improve and protect the health and well-being of her citizens." *Kleid v. Board of Education*, 406 F.Supp. 902, 905 (W.D. Ky. 1976).

Since the 1970s, the relationship between the States and Federal government has undergone a revision. "[T]he Tenth Amendment reserves to states all powers not specifically granted to the national government or prohibited

to the states. It has been resurrected from its earlier obscurity to serve as the legal basis for striking down federal laws that the Court majority believes interfere with powers reserved to the states."[6] There has occurred what has been termed a "devolution revolution" in which many functions have been returned to states.[7]

In what scholars have termed the "new federalism", judicial decisions since the mid 1970s have increasingly recognized the sovereignty, and importance, of the states that comprise this indissoluble union. *Texas v. White*, 74 U.S. 700, 19 L.Ed. 227 (1868). The principles contained in the Tenth Amendment of the United States Constitution have gained new and different life by a progeny of cases over the course of the last thirty years. These profound philosophical and judicial changes have occurred during the time after the *Roe v. Wade* decision was handed down and constitute such a change as to profoundly effect the prospective application of *Roe v. Wade*.

The importance of the States in the Federalist system is increasing. This enhanced stature is described by this Court in *Printz v. United States*, 521 U.S. 898, at 919, 117 S.Ct. 2365, 138 L.Ed. 2d 914 (1997):

> "It is incontestible that the Constitution established a system of 'dual sovereignty.' *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S.Ct. 2395, 2399, 115 L.Ed.2d 410 (1991); *Tafflin v. Levitt*, 493 U.S.

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[6] *See,* David C. Saffell and Harry Basehart *State and Local Government: Politics and Public Policies* (7th ed. 2001) p. 48 *citing to* Matthew D. Alder and Seth F. Kreimer, "The New Etiquette of Federalism: New York, Prince, and Yesky," in *1998 Supreme Court Review* (Chicago: University of Chicago Press, 1999), p. 71.

[7] *See,* James MacGregor Burns, J. W. Peltason, Thomas E. Cronin, David B. Magleby, David M. O'Brien, Paul C. Light, *Government by the People* (20th ed. 2004) p. 61, *citing* "The Devolution Revolution" Daniel Patrick Moynihan, *New York Times*, August 6, 1995, p. B15.

> 455, 458, 110 S.Ct. 792, 795, 107 L.Ed.2d 887 (1990). Although the States surrendered many of their powers to the new Federal Government, they retained 'a residuary and inviolable sovereignty,' The Federalist No. 39, at 245 (J. Madison). This is reflected throughout the Constitution's text. . . . including (to mention only a few examples) the prohibition on any involuntary reduction or combination of a State's territory, Art. IV, § 3; the Judicial Power Clause, Art. III, § 2, and the Privileges and Immunities Clause, Art. IV, § 2, which speak of the "Citizens" of the States; the amendment provision, Article V, which requires the votes of three-fourths of the States to amend the Constitution; and the Guarantee Clause, Art. IV, § 4, which "presupposes the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights," *Helvering v. Gerhardt,* 304 U.S. 405, 414-415, 58 S.Ct. 969, 973, 82 L.Ed. 1427 (1938). Residual state sovereignty was also implicit, of course, in the Constitution's conferral upon Congress of not all governmental powers, but only discrete, enumerated ones, Art. I, § 8, which implication was rendered express by the Tenth Amendment's assertion that '[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.'"

The rights and powers of states to address medical and mental health issues are given the widest latitude. This Court noted in Footnote 3 of *Kansas v. Hendricks*, 521 U.S. 346, 360 (1997) that:

> "We recognize, of course, that psychiatric professionals are not in complete harmony in casting

> pedophilia, or paraphilias in general, as "mental illnesses." Compare Brief for American Psychiatric Association as *Amicus Curiae* 26 with Brief for Menninger Foundation et al. as *Amici Curiae* 22-25. These disagreements, however, do not tie the State's hands in setting the bounds of its civil commitment laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes. Cf. *Jones v. United States*, 463 U.S. 354, 365, n. 13, 103 S.Ct. 3043, 3050, n. 13, 77 L.Ed.2d 694 (1983). As we have explained regarding congressional enactments, when a legislature 'undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation.'"

Additionally, liberties protected under the Due Process Clause of the Fourteenth Amendment may be subject to restriction by the State in the exercise of its power to protect the public health and to enhance the general welfare. "[T]he mere fact that a person is detained does not inexorably lead to the conclusion that the government has imposed punishment. The State may take measures to restrict the freedom of the dangerously mentally ill. This is a legitimate nonpunitive governmental objective and has been historically so regarded." *Id.* at 363.

In a dissenting opinion in *Stenberg v. Carhart,* 530 U.S. 914, 970 (2000), it was recognized that there is "substantial authority allowing the State to take sides in a medical debate, even when fundamental liberty interests are at stake." (J. Kennedy, dissenting.) The power and interests of the states have also been increased particularly in the protection and preservation of human life. Again, the dissent in *Stenberg v. Carhart*, at 957, noted that "The political processes of the state are not to be

foreclosed from enacting laws to promote the life of the unborn and to ensure respect for all human life and its potential. [*Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 871 (1992)]" (joint opinion of O'Connor, Kennedy, and Souter, JJ). The State's constitutional authority is a vital means for citizens to address these grave and serious issues, and they must if we are to progress in knowledge and understanding and in the attainment of some degree of consensus. . . ." (J. Kennedy, dissenting.)

This Court found in *Cruzan v. Director, Mo. Dept. of Health*, 497 U.S. 261, 282 (1990) that "a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual." And, States have an interest in "protecting vulnerable groups – including the poor, the elderly, and disabled persons – from abuse, neglect, and mistakes." *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997).

## V. THE FACTUAL FOUNDATION OF *ROE V. WADE* IS UNDERMINED AND TO ALLOW ITS CONTINUED PROSPECTIVE APPLICATION IS UNJUST

A fundamental tenet of the Court's decision in *Roe v. Wade* was the necessity of preserving the health of the mother. The Court recognized the interest the State of Texas had in preserving that health:

> "We repeat, however, that the State does have an important and legitimate interest in preserving and protecting the health of the pregnant woman, whether she be a resident of the State or a non-resident who seeks medical consultation and treatment there, and that it has still another

> important and legitimate interest in protecting the potentiality of human life. These interests are separate and distinct. Each grows in substantiality as the woman approaches term and, at a point during pregnancy, each becomes 'compelling.'
>
> "With respect to the State's important and legitimate interest in the health of the mother, the 'compelling' point, in the light of present medical knowledge, is at approximately the end of the first trimester. This is so because of the now-established medical fact, referred to above at 725, that until the end of the first trimester mortality in abortion may be less than mortality in normal childbirth. It follows that, from and after this point, a State may regulate the abortion procedure to the extent that the regulation reasonably relates to the preservation and protection of maternal health." *Id.*, 162-163.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), this Court did not have the facts necessary to challenge the decision in *Roe v. Wade*:

> "Because neither the factual underpinnings of *Roe*'s central holding nor our understanding of it has changed (and because no other indication of weakened precedent has been shown), the Court could not pretend to be reexamining the prior law with any justification beyond a present doctrinal disposition to come out differently from the Court of 1973." *Id.*, 860.

However, *Planned Parenthood of Southeastern Pa. v. Casey* recognized that *Roe v. Wade* could be changed, if not overturned, were its factual foundations challenged.

Woman after woman provided affidavits that answered three questions: "How has your abortion affected you?", "Based on your own experiences, what would you

tell a woman considering an abortion?", and "Based on your own experience, what would you tell a court that believes abortion should be legal?" The answers from all of these women were that abortion caused psychological, physical, and/or relational difficulties. Not a one recommended abortion, and they all asked the court to at least know the truth of what abortion does to women. The instant case presents a challenge to these foundations. With over 5,300 pages of testimony from nearly one thousand women who had abortions, along with the expert opinions of two health care professionals, *Roe v. Wade* is seriously challenged. The uncontroverted evidence provided by the Petitioner shows in detail the physical, emotional, and psychological harm done to the women who have undergone abortions.

*Planned Parenthood of Southeast Pa. v. Casey* made clear that abortion affects those other than the woman having the abortion. Abortion affects the spouse, family, and society at large. *Id.* at 852.

"Elective abortion is an important cause of child abuse. . . . Recent evidence indicates many women harbour strong guilt feelings long after their abortions. Guilt is one important cause of child battering and infanticide. Abortion lowers women's self-esteem and there are studies reporting a major loss of self-esteem in battering parents. . . ."[8] Evidence shows that psychological trauma occurs in those other than the woman electing abortion. Some of these groups are: children who have had either a brother or sister, or both, who were aborted; children with developmental disabilities or handicaps; "children who

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[8] *See* P. Ney, M.D. *Relationship Between Abortion and Child Abuse* Canada Journal of Psychiatry, vol. 24, pp. 610-620.

survived deliberate attempts to terminate their lives by saline, suction curettage or hysterotomy".[9]

Abortion destroys interpersonal relationships, whether these be marriages or not.[10] Men are negatively affected and in turn they engage in behavior that is destructive to themselves and society at large.[11] The impact to society has gone well beyond what was anticipated by the *Roe v. Wade* court.

## CONCLUSION

For the foregoing reasons, the reasons contained in the petition and for those reasons discussed by other *amicus curiae,* the petition for a writ of certiorari should be granted.

Respectfully submitted,

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[9] *See* Philip G. Ney, *Emotional and Physical Effects of Pregnancy Loss on the Woman and Her Family: A Multi-Centered Study of Post-Abortion Syndrome and Post-Abortion Survivor Syndrome*, Post-Abortion Aftermath (Sheed & Ward 1994) Michael T. Manion, editor; p. 74.

[10] *See,* Vincent M. Rue, *The Psychological Realities of Induced Abortion*, Post-Abortion Aftermath (Sheed & Ward 1994) Michael T. Manion, editor; p. 26; Theresa Burke and David C. Reardon, *Forbidden Grief* (Acorn Books 2002) pp. 201-220.

[11] *See,* Thomas Strahan, *Portraits of Post-Abortive Fathers Devastated by the Abortion Experience*, Association for Interdisciplinary Research in Values and Social Change Nov/Dec 1994, pp. 2-3; David C. Reardon, *Forgotten Fathers and Their Unforgettable Children* The Post Abortion Review 4(4) Fall 1996.